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**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

In re:

PG&E CORPORATION

-and-

**PACIFIC GAS AND ELECTRIC
COMPANY,**
Debtors.

☐ Affects PG&E Corporation
☐ Affects Pacific Gas and Electric
Company

☒ Affects both Debtors

**All papers shall be filed in the Lead Case,
No. 19-30088 (DM)*

Bankruptcy Case
No. 19-30088 (DM)

Chapter 11 (Lead Case)
(Jointly Administered)

**ADDITIONAL RESPONSE OF OFFICIAL
COMMITTEE OF TORT CLAIMANTS TO
DEBTORS' RESTATED RESTRUCTURING
SUPPORT AND SETTLEMENT
AGREEMENT WITH THE CONSENTING
SUBROGATION CLAIMHOLDERS [DKT
NO. 4554-1]**

Date: December 4, 2019
Time: 10:00 a.m. (Pacific Time)
Place: United States Bankruptcy Court
Courtroom 17, 16th Floor
San Francisco, CA 94102

1 The Official Committee of Tort Claimants (“**TCC**”) respectfully files this additional
2 response to the Restated Restructuring Support Agreement (the “**Settlement**”) [Dkt. No. 4554-1]
3 filed by PG&E Corporation and Pacific Gas & Electric Company (“**PG&E**” and collectively, the
4 “**Debtors**”), and the Ad Hoc Group of Subrogation Claim Holders (“**Subrogation Claimants**”),
5 the Court’s Tentative Considerations [Dkt. No. 4872] and the responsive Statement of the
6 Subrogation Claimants [Dkt. No. 4921]. In support of this response, the TCC is filing
7 contemporaneously herewith the Declaration of Xavier Oustalniol (the “**Oustalniol Decl.**”).

8 This response addresses two of the Court’s tentative considerations: First, the Court stated
9 that it would consider subordination of Subrogation Claims on a claim-by-claim basis. Second, the
10 Court stated that an insured victim’s release of the insurer of made whole claims as a condition of
11 receiving a settlement payment from the trust is legal, because the insured has a choice of
12 consenting to the release or trying his or her claims to judgment (along with the 70,000 other victim
13 trials that would take place over a 10-12 year period of time, if each victim takes this Court up on
14 its solution of trying all claims to preserve the rights against the insurers.)

15 In response, the Subrogation Claimants filed a “Solution” that says that the insured victims
16 “can assert made whole claims on a claim-by-claim basis, except to the extent such individuals
17 voluntarily agree to settle their claims and execute a release.” In other words, the Subrogation
18 Claimants’ “Solution” is that this Court will enter a judgment subordinating Subrogation Claims
19 on a claim-by-claim basis in the pending adversary proceeding or at confirmation, and when the
20 victims accept their settlements years later from the resolution trust, they will voluntarily consent
21 to execute releases which would retroactively, years later, undo the subordination judgment entered
22 in the adversary proceeding or at plan confirmation.

23 This response explains why such a “consensual release” is illegal in the Ninth Circuit, and
24 analyzes the billions of dollars involved in this dispute, which the Subrogation Claimants argue
25 could be reversed retroactively years later in trust administration.

26 **Releases**

27 To be clear, there are two distinct releases at issue: (i) an “opt-in” release on the ballot that
28 would release all claims held by fire victims against insurers/subrogation claimholders if it is

checked; and (ii) a second release, only of made whole rights, before any fire victim can receive payment from the estate under any settlement. Ninth Circuit case law is clear that a bankruptcy court lacks jurisdiction to approve the latter, and may lack jurisdiction to approve the former.

In *Underhill v. Royal*, 769 F.2d 1426, 1432 (9th Cir. 1985), the Ninth Circuit held that, under Bankruptcy Code section 524(e), a bankruptcy court lacks jurisdiction to approve a plan that contains a release between two non-debtor parties, and **a creditor's consent to the release, as a condition of receiving a payment under the plan, does not cure the court's lack of jurisdiction.**

In *Underhill*, the plan released creditors' securities claims against non-debtor insiders. *Id.* at 1431-32. The bankruptcy court approved the plan over the creditors' objection that the court lacked jurisdiction to approve a plan that contained a release between non-debtor parties. On appeal to the Ninth Circuit, the debtor argued that the infirmity in the plan release was cured because the creditors had consented to the release *by accepting payment under the plan*. The Ninth Circuit held that the creditor's consent to the release by accepting a payment under the plan did not cure the court's lack of jurisdiction:

When a bankruptcy court discharges the debtor, it does so by operation of the bankruptcy laws, not by consent of the creditors. . . .

Consequently, "the **payment** which effects a discharge is not consideration for any promise by the creditors, much less for one to release non-party obligors." . . .

The bankruptcy court "has no power to discharge the liabilities of a bankrupt's guarantors."

769 F.2d at 1432 (emphasis added) *citing Union Carbide Corp. v. Newboles*, 686 F.2d 593, 595 (7th Cir. 1982) (per curiam).

The Ninth Circuit cited the Seventh Circuit's decision in *Union Carbide*, which struck down a consent mechanism in a settlement arrangement that is similar to PG&E's settlement release in this case:

Acceptance and confirmation of this Arrangement shall constitute a full settlement, satisfaction and discharge of all claims, demands, actions, causes of action or otherwise against not only the Debtor, but also against any other persons or entities who have entered into guaranty or indemnity agreements with unsecured creditors or who have endorsed commercial paper for the benefit of the Debtor.

686 F.2d at 594.

1 With respect to the idea that creditors, like the victims here, have a “choice” to consent to
2 the release, the Seventh Circuit provided this analysis, which seems appropriate for this PG&E
3 case also:

4 A creditor’s approval of the plan cannot be deemed an act of assent having
5 significance beyond the confines of the bankruptcy proceedings, simply because
6 the gamesmanship importuned from state contract law into the bankruptcy
7 proceedings would be intolerable.

8 In summary, in three separate decisions the Ninth Circuit has held that this rule is
9 “jurisdictional,” and that a bankruptcy court’s inability to approve a third-party release in a plan is
10 not a matter of a creditor’s consent or choice, but of *the court’s lack of authority to approve a non-*
11 *debtor release*. See *In re Lowenschuss*, 67 F.3d 1394, 1401-02 (9th Cir. 1995) (holding that the
12 bankruptcy court “lacks the power” to discharge liabilities of non-debtors); *American Hardwoods,*
13 *Inc. v. Deutsche Credit Corp. (In re American Hardwoods, Inc.)*, 885 F.2d 621, 626 (9th Cir. 1989)
14 (“no power”); *Underhill v. Royal*, 769 F.2d 1426, 1432 (9th Cir. 1985) (“no power”).

15 This issue is an important one that involves billions of dollars of recoveries for the victims,
16 as we will explain in the next section. See, e.g., Order on Applicability of Inverse Condemnation;
17 Rule 54(b) Certification, at 3 [Dkt No. 4949] (“this issue determines Debtors’ liability for billions
18 of dollars and shapes the outline of a Chapter 11 plan and this case in general.”). Accordingly, if
19 this Court concludes the Court has the power to approve a plan term that creates a release between
20 non-debtor parties, the insured victims and their insurers, the TCC requests that the Court certify
21 that decision to the Ninth Circuit now so the victims do not need to delay their settlements with the
22 Resolution Trust until the dispute is resolved.

23 Both the settlement release, and the opt-in ballot release, are also both unfair because they
24 are not mutual: the insurers have a claim against the insureds for recovery of payments made by
25 PG&E to the insureds, and the insureds have claims against the insurers under the made whole rule,
26 among other claims. Any fair release would be mutual. But the plan and RSA settlement set up
27 two separate one-sided releases—one in the ballot, and one in any settlement for payment—which
28 subjects the victims to more uncertainty and financial impairment, here from the very insurers who
are supposed to put the insured victims’ rights first. The one-sided aspect of both releases renders

1 them unfair by definition, and unworthy of the imprimatur of this Honorable Court. Moreover, no
2 release should be permitted to release open insurance claims, ongoing coverage disputes, or any
3 claims that are not related to the Debtors' liability to insureds.

4 **Made Whole**

5 The TCC's financial consultants have begun reviewing the attachments recently filed by
6 each Subrogation Claimant to its proof of claim, as well as files prepared by the Debtors' experts
7 that were recently made available. This analysis is ongoing and is not complete. *See* Oustalniol
8 Decl. at ¶¶ 8-10. Pursuant to the Wildfire Subrogation Claimant Proof of Claim Form, which is
9 Exhibit A-3 to the Court's bar date order dated July 1, 2019 [Dkt. No. 2806], the Subrogation
10 Claimants were required to submit detailed information on the "Attachment 1s" to support their
11 proofs of claim by November 21, 2019, 30 days after the Bar Date. The TCC's financial consultants
12 have been able to determine, as a preliminary manner, that of the 59,877 records included in the
13 Subrogation Claims, 27,993 have unique IDs that correspond to records that can be found in Prime
14 Clerk. *Id.* at ¶ 16. This indicates that potentially \$10.8 billion or more of the Subrogation
15 Claimants' claims correspond on a claim-by-claim basis to individual wildfire claims filed against
16 the Debtors and thus are subject to mandatory subordination under California law. *See id.* It
17 appears that the Debtors have failed to undertake any analysis on this issue. *Id.* at ¶ 7.

18 In support of the Debtors' original motion to approve the Settlement [Dkt. No. 3992]
19 ("Motion"), the Debtors submitted the Declaration of Jason P. Wells [Dkt. No. 3993] ("**Wells**
20 **Declaration**"), which stated that "[t]he aggregate amount of Subrogation Claims that may be
21 asserted in these Chapter 11 Cases are likely in excess of \$20 billion," and does not contain an
22 analysis of whether any of those claims are subject to California's subordination law. Mr. Wells
23 did not set forth any evidence showing that these claims were actually filed.

24 The TCC objected to the Motion [Dkt. No. 4232], arguing on page 21 that the Wells
25 Declaration did not provide any fact specific analysis of the Rule 9019 factors. The Adventist
26 Claimants, in their opposition to the Motion [Dkt. No. 4239], argued on page 4 that the Wells
27 Declaration lacks evidence to demonstrate personal knowledge of the facts, and that no evidence
28 was presented to show the amount of current claims. These objections remain unresolved.

CONCLUSION

Wherefore, for all of the reasons argued herein and in the TCC's oppositions to the 9019 Motion, the TCC respectfully requests that this Court deny the Motion. If the Court approves the Motion, the TCC requests that the Court certify the decision to the Ninth Circuit.

Dated: December 3, 2019

BAKER & HOSTETLER LLP

By: /s/ Robert A. Julian
Robert A. Julian

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